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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1301

STATE OF LOUISIANA,

Petitioner,

versus

JOHN ERNEST BIRABENT,

Respondent.

Opposition to Granting of Writ of Certiorari to the Supreme Court of the State of Louisiana

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Respondent, John Ernest Birabent, respectfully submits that the Writ of Certiorari applied for herein to review the judgment of the Supreme Court of the State of Louisiana entered in the above entitled case on December 2, 1974, rehearing denied January 17, 1975, should be denied.

OPINIONS BELOW

The trial court decision in this matter appears at Appendix B. The decision of the Louisiana Supreme Court denying the first application for writs filed by

respondent appears at Appendix C. The decision of the Louisiana Supreme Court granting respondent's motion to quash based upon double jeopardy grounds appears at Appendix G.

ISSUES

Petitioner, the State of Louisiana, asserts that:

1. The final decision of the Supreme Court of the State of Louisiana is in conflict with the holding of this Honorable Court in *Illinois v. Sommerville*, 410 U.S. 458, 93 S. Ct. 1066 (1973); and

2. Respondent was not properly informed of the nature of the offense with which he was charged and, therefore, the mistrial granted herein by the trial court, over defense objection, was legally granted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions are set forth in Appendix I. They are:

1. Louisiana Code of Criminal Procedure, Articles 383, 462, 465, 487, 591, 592, 775.

2. Louisiana Revised Statutes, Title 14, Section 31.

STATEMENT OF THE CASE

Respondent was charged by a bill of indictment with the crime of manslaughter. After jeopardy had at-

tached, counsel for the State of Louisiana moved for a mistrial on the ground that there was a substantive defect in the indictment. The trial court, over respondent's objection, granted the mistrial. The trial court subsequently permitted the State to amend the indictment in question in such a way as to constitute a murder indictment. The respondent filed a motion to quash the indictment as amended on the ground of double jeopardy. Said motion to quash was denied in the trial court, but was granted by the Supreme Court of the State of Louisiana, upon application for Writs of Certiorari, Prohibition and Mandamus filed by respondent. (See Appendix G.) The following is a more detailed factual background of the case at hand.

On May 22, 1972, the Grand Jury for the 25th Judicial District Court, Parish of St. Bernard, State of Louisiana, returned an indictment against respondent charging him with the crime of manslaughter in that he "unlawfully killed Thomas Sciortino." Said bill of indictment was duly signed by Gilbert V. Andry, III, Assistant District Attorney for the Parish of St. Bernard. On the reverse side of said indictment same is endorsed "A true bill, Harry M. Fisher, Foreman, St. Bernard Parish Grand Jury, 22 May, 1972." (See Appendix A.)

Reference is made by petitioner herein, the State of Louisiana, to the fact that at the time said indictment was returned in open court, "neither the judge, grand jurors, prosecutor, or defense counsel was cognizant of the discrepancy between the charge read aloud, [indictment for murder] and the pertinent body of the true

bill which, while not read in open Court," charged that respondent "unlawfully killed Thomas Sciortino." It should be pointed out to the Court that at the time said indictment was returned, neither the respondent nor defense counsel were present in open court.

The respondent was arraigned on said bill of indictment on May 29, 1972, and entered a plea of not guilty to the offense charged therein, namely, manslaughter, as may be seen by reference to Page 4 of the Petition for Writs filed herein by the State of Louisiana. At the time said plea of not guilty was entered, defendant had not even been served with a copy of said indictment. (See Page 4 of the Application for Writs filed herein by the State of Louisiana.)

Said case was assigned for trial on October 4, 1973, on which date the selection of the jury was commenced, said selection being completed on October 5, 1973. During the voir dire, the questions propounded by counsel for the State were typical of those usually propounded during the voir dire preceding the trial of a murder case. Defense counsel did not object to such questions. Subsequent to the selection and swearing of said petit jury, the indictment was duly read to the jury and the trial of the respondent commenced. Opening statements were made by counsel for the State and counsel for the defense. The opening statement which was made by counsel for the State clearly indicated that counsel for the State was under the impression that the respondent was being tried for the crime of murder rather than manslaughter. Counsel for the defense did not object to the State's opening argument

on that ground. Subsequent to said opening statements, the State called as its first witness Deputy Sheriff Wallace Ansardi, who was duly sworn and who testified on direct examination against the respondent.

During the testimony of Deputy Sheriff Ansardi, counsel for the respondent moved the Court to restrict all testimony to that which was appropriate to a manslaughter prosecution as opposed to a murder prosecution, for the reason that the indictment in said proceedings charged the respondent with the crime of manslaughter and not murder. This motion was granted by the trial court.

At this point, the State moved to amend the indictment from a manslaughter indictment to a murder indictment. Counsel for the respondent objected to such an amendment on the grounds that same would be an amendment as to substance rather than as to form, and, further, that the Court had no power to amend an indictment in such a way as to increase the severity of the charge in the indictment returned by the grand jury. The trial court maintained this objection and refused to permit the amendment to the indictment.

Counsel for the State, after the above ruling, moved the Court for a mistrial on the ground that there was a defect in substance in the indictment, said defect being of such a nature as to render it impossible for a valid verdict to be returned thereon. Counsel for the respondent objected to the granting of a mistrial on the ground that there was no defect in substance in the in-

dictment. The trial court overruled the defense objection, and granted a mistrial. Counsel for the respondent duly reserved a bill of exception to said ruling.

The contention of counsel for the State that said indictment was defective in substance was based upon the fact that the caption typed on the reverse side of said indictment read as follows:

> "Indictment for Murder
> 1950 L.R.S. 14:30."

It was the contention of counsel for the State that this caption constituted an integral part of the indictment and was contradictory to the charging portion thereof.

After the mistrial was granted, counsel for the State informed the Court that he intended to call the Grand Jury into session for the purpose of obtaining a murder indictment against the respondent. Upon receiving this information, and before any such indictment had been returned, the trial court then and there set December 4, 1973, as the trial date on the non-existent new indictment.

On November 27, 1973, counsel for the State filed a "Motion to Correct the Indictment so as to Make All Elements Thereof Conform to the Charge of Murder." (See Appendix D.)

The aforementioned motion of counsel for the State to "correct" the indictment was brought for hearing on December 11, 1973. After argument by both State and

defense, the trial court ruled that said indictment was defective in substance and granted permission to counsel for the State to amend same to read, ". . . murdered Thomas Sciortino." Counsel for Respondent objected to the ruling of the Court and the amendment and duly reserved bills of exception thereto. (See Appendix E for a copy of the amended indictment.)

During this hearing, the trial court permitted the State to call as a witness Harry M. Fisher, the foreman of the Grand Jury who had previously indicted respondent, and permitted said witness to testify to the effect that the Grand Jury *intended* to indict your respondent for the crime of murder. Counsel for the respondent reserved a bill of exception to the Court's permitting this testimony over defense objection.

After the amendment to the bill of indictment, the trial court set January 7, 1974, as the date for the respondent's arraignment on the amended indictment. At this point, in open court, counsel for the respondent verbally notified the trial court within the hearing of counsel for the State of his intention to apply to the Supreme Court of the State of Louisiana for writs of certiorari, prohibition and mandamus in connection with the trial court's permitting the amendment to the indictment in question. Subsequently, on December 13, 1973, counsel for the respondent notified the trial court in writing of such intention, sending a copy of such notification to the District Attorney for the Parish of St. Bernard, State of Louisiana. Both said original notice and the copy were sent by Certified Mail, postage prepaid, return receipt requested.

In due course, respondent applied to the Supreme Court of the State of Louisiana for writs of certiorari, prohibition and mandamus, in connection with the trial court's permitting the amendment of the indictment for manslaughter to murder. Said application for writs bears the number 54-262 on docket of the Supreme Court of the State of Louisiana.

On February 1, 1974, the Supreme Court of the State of Louisiana, denied respondent's application for writs of certiorari, prohibition and mandamus, stating as its reason that "relator [respondent] has an adequate remedy in the trial court if error was committed." Mr. Justice Barham, in concurring, gave as his reason that "the issues presented here may be more pointedly made by motions in the trial court if prosecution continues. Adequate remedy is available in this Court if the trial court errs in future rulings." Mr. Justice Dixon, in "dissenting", gave as his reason that "a grand jury indictment cannot be 'amended' by the court from manslaughter to murder. Defendant [respondent] has already been placed in jeopardy for this killing." (See Appendix C for said Court's judgment denying said writs.)

On February 6, 1974, respondent filed a motion to quash said indictment on the ground of double jeopardy. After due proceedings, on March 11, 1974, the trial court overruled said motion to quash for the reason that said original indictment contained a defect in substance and that no valid verdict could have been returned thereon. Respondent objected to said ruling and duly reserved a bill of exception thereto, making

the entire record part of said bill of exception. (See Appendix F for respondent's motion to quash.)

Immediately after said ruling, counsel for respondent hand delivered to the trial court, along with the District Attorney, written notice of his intention to apply to the Supreme Court of the State of Louisiana once again for writs of certiorari, prohibition and mandamus, in connection with the trial court's action in overruling said motion to quash.

On April 30, 1974, the Supreme Court for the State of Louisiana granted the requested writs and on December 2, 1974, said Court rendered a decision granting respondent's motion to quash, holding that the indictment in question was a perfectly valid indictment for manslaughter, and that, therefore, the mistrial granted by the trial court constituted an illegal dismissal of the prosecution against respondent, thus rendering applicable the constitutional and statutory provisions against double jeopardy. (See Appendix G.)

The State timely filed a petition for rehearing, which was denied on January 17, 1975. (See Appendix H.)

ARGUMENT IN SUPPORT OF DENYING THE WRIT APPLIED FOR HEREIN

A. The Indictment Was Not Defective In Substance.

It is respectfully submitted that the indictment in question contains no defect of substance as it is a

perfectly valid indictment for the crime of manslaughter, as was held by the Louisiana Supreme Court. The body of the indictment charges that the respondent, John Ernest Birabent, "unlawfully killed Thomas Sciortino." This wording is in strict compliance with the requirements of Article 465 of the Louisiana Code of Criminal Procedure, which reads in pertinent part, as follows:

> "Article 465. Specific Indictment Forms. The following forms of charging offenses may be used, . . .
>
> Manslaughter — AB unlawfully killed CD . . ."

Neither Article 465 nor any other article of the Louisiana Code of Criminal Procedure establishes any requirement regarding the citation of the statute in question in the endorsement on the reverse side of the bill of indictment.

Article 383 of the Louisiana Code of Criminal Procedure, which specifically discusses the endorsement, states only that the indictment must be endorsed, "a true bill," and that the endorsement must be signed by the foreman. A glance at the endorsement on the indictment in question clearly establishes that both of these requirements were complied with. (See Appendix A.)

Further, Article 462 of the Louisiana Code of Criminal Procedure, which governs the form of the Grand Jury indictment, concerns itself only with the

body of the indictment, and makes no reference to the endorsement. It is apparent, therefore, that there exists no statutory requirement that the endorsement of the indictment even mention the statute under which the accused is being charged.

Moreover, the jurisprudence of Louisiana is replete with cases which unequivocally state that the endorsement is not part of the indictment. See, *e.g.*, *State v. Lawrence*, 221 La. 861, 60 S. 2d 464, (1952); *State v. McClellan*, 155 La. ____, 98 So. 748 (1924); *State v. Pointdexter*, 117 La. 380, 41 So. 688 (1906); *State v. De Hart*, 109 La. 570, 33 So. 605 (1903); *State v. Russell*, 33 La. Ann. 135 (1881); *State v. McGinnis*, 12 La. Ann. 743 (1857); *State v. Rohfirscht*, 12 La. Ann. 382 (1857). For example, in *State v. Pointdexter*, 117 La. 380 41 So. 688 (1906), the Court emphasized that:

> ". . . endorsement only is not a part of the indictment; that the endorsement of the offense for which a true bill is found is *not essential to the validity of the indictment.*" 41 So. at 690. (Emphasis Added.)

In *State v. De Hart*, 109 La. 570, 33 So. 605 (1903), the Court had previously stated that:

> "The endorsement of the name of the offense on the back of an indictment is no part of the finding of the Grand Jury. . . .
>
> . . . It need not have contained any other caption than "a true bill," with the signature of the foreman of the Grand Jury. . . .

> . . . [T]he concise endorsement of the character of the offense upon an indictment is for convenience only, and forms no part of the substance of the charge, and that a *mistake of the district attorney, or the clerk, in making such endorsement, neither enlarges, reduces, nor vitiates the accusation contained in the body of the indictment.*" 33 So. at 607. (Emphasis Added.) (Citations omitted.)

More recently, in *State v. Lawrence*, 221 La. 861, 60 So. 2d 464 (1952), it was stated:

> ". . . to ascertain the crime with which a defendant is charged, the body of the indictment or information is to be considered rather than an endorsement on its back, *the latter constituting no substantive part of the charge.*" 60 So. 2d at 465. (Emphasis Added.)

From the above, it is abundantly apparent that the indictment in the case at bar was a valid one, being free of substantive defects, and properly charging the crime of manslaughter.

B. The Trial Court Improperly Ordered A Mistrial.

It is uncontested that jeopardy had attached when the mistrial was ordered by the trial court over defense objection. Not only had the first witness been sworn on the trial on the merits, but this first witness, after having been sworn, had testified on direct examination.

Article 592 of the Louisiana Code of Criminal Procedure provides in pertinent part, as follows:

> "When a defendant pleads not guilty, jeopardy begins when the first witness is sworn at the trial on the merits. * * *"

The primary authority for the granting of a mistrial is found in Louisiana Code of Criminal Procedure, Article 775, which lists the various grounds for a mistrial (Articles 770 and 771 of the Louisiana Code of Criminal Procedure are not applicable in the case at bar for the reason that this mistrial was granted over defense objection and not upon request of the defendant.)

Article 775 of the Louisiana Code of Criminal Procedure provides in pertinent part, as follows:

> "A mistrial may be ordered and in a jury case the jury dismissed, when:
>
> * * *
>
> (3) There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; * * *"

In *State v. Clouatre*, 262 La. 651, 264 So. 2d 595, at 600-601 (1972), this Honorable Court held:

"Mistrial is a drastic remedy. It is only authorized in specific instances where unnecessary prejudice results to the accused."

It is respectfully submitted that the mistrial declared in the case at bar was not so authorized, and that, therefore, it constituted an illegal dismissal of the proceedings.

The trial court's basis for the granting of this mistrial over defense objection was the mistaken belief that the indictment contained a substantive defect which would have rendered impossible a valid verdict and judgment as mentioned in Article 775 of the Louisiana Code of Criminal Procedure, hereinabove quoted.

Article 487 of the Louisiana Code of Criminal Procedure is very specific in authorizing the ordering of a mistrial where there is a defect of substance in the indictment. Article 487 reads as follows:

"Art. 487. Defective Indictment; amendment

A. An indictment that charges an offense in accordance with the provisions of this Title shall not be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because of any miswriting, misspelling, or improper English, or because of the use of any sign, symbol, figure, or abbreviation, or because any similar defect, imperfection, omission, or uncertainty exists therein. The court may at

any time cause the indictment to be amended in respect to any such formal defect, imperfection, omission, or uncertainty.

Before the trial begins the court may order an indictment amended with respect to a defect of substance. *After the trial begins a mistrial shall be ordered on the ground of a defect of substance.*" (Emphasis Added.)

The question of the validity of the indictment and the lack of a defect of substance have been briefed in *ARGUMENT A.*, hereinabove, and counsel submits that the authorities cited make it clear that there was no substantive defect in this indictment and, consequently, no right vested in the trial court to grant a mistrial. The decision of the Supreme Court of Louisiana granting respondent's motion to quash based upon grounds of double jeopardy is, therefore, *not* in conflict with this Honorable Court's decision in *Illinois v. Sommerville*, 410 U.S. 458, 93 S. Ct. 1066 1973), in that a proper verdict of guilty of manslaughter could have been returned by the jury on the basis of said indictment and that, in the absence of any substantive defect in said indictment, the trial court had no reason or justification whatsoever to declare a mistrial.

Consequently, the mistrial in the case at hand was not "legally ordered." The intention of the redactors of the Code of Criminal Procedure in such cases is clearly evidenced by the Official Revision Comment found under Louisiana Code of Criminal Procedure Article 775:

"(e) This Article [Article 775] must be considered in the light of Art. 591, which reads as follows:

'Art. 591. Double Jeopardy; definition

No person shall be twice put in jeopardy of life or liberty for the same offense, except, when on his own motion, a new trial has been granted or judgment has been arrested, or where the provisions of Article 775 or ordered with the express consent of the defendant.'

The effect of the articles taken together is as follows:

(1) Mistrials, without the consent of the defendant, are permitted under certain limited circumstances such as inability of the jury to agree, physical impossibility to proceed, etc.

(2) *All other dismissals of the jury prior to verdict without the defendant's consent will not be mistrials at all, even though the court may so label them, but will be illegal dismissals, and in such cases the principles of double jeopardy will come into operation.*" (Emphasis Added.)

Furthermore, this very Court has held that a mistrial improperly granted, without the consent of the

defendant, required application of the principles of double jeopardy and barred further prosecution of the defendant for the offense in question. *United States v. Jorn*, 400 U.S. 470, 91 S. Ct. 547 (1971). In its consideration of the situation, this Court stated that:

> "[E]ven in circumstances where the problem reflects error on the part of one counsel or the other, the trial judge must still take care to assure himself that the situation warrants action on his part for eclosing the defendant from a potentially favorable judgment by the tribunal." 400 U.S. at 486, 91 S. Ct. at 557.
>
> "[I]n the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." 400 U.S. at 487, 91 S. Ct. at 558.

C. The Trial Court Had No Power To Upgrade The Offense Charged In The Indictment.

The District Attorney is generally without power to amend an indictment in such a way as to charge a graver crime, as he was permitted by the Court to do in the case at bar. In *State v. Dent*, 189 La. 159, 179 So. 67 (1938), the Court in sustaining a Motion to Quash an Indictment which the District Attorney had amended

in such a way as to charge a more serious crime, stated as follows:

> "As the indictment as amended by the district attorney is, in effect, a substituted indictment, charging a graver crime, with a heavier penalty, for the original indictment returned by the Grand Jury, the amendment ought not to have been allowed. . . .
>
> Although Article 253 of the Code of Criminal Procedure authorizes the Court where there is a defect in an indictment, either of form or substance, to permit its amendment, *the amendment contemplated by the codal article is not such an amendment as will make the indictment charge a graver crime, with a heavier penalty, than the crime presented by the Grand Jury.*" 179 So. at 69. (Emphasis Added.) (Citations omitted.)

It should be noted that the *Dent* case was decided under Article 253 of the 1928 Louisiana Code of Criminal Procedure, which Article was considerably broader in its wording than is the present Article 487, and which Article purportedly governed "any defect, imperfection or omission in form or substance." However, it should be further noted that the former Article 253 was limited in scope to formal defects by *State v. McDonald*, 178 La. 612, 152 So. 208 (1934). It is submitted that the more narrowly drawn present Article 487 was never intended to permit the district attorney to amend an indictment in such a way as to charge a graver crime than had been charged by the Grand Jury.

D. The Louisiana Supreme Court Properly Granted The Motion To Quash The Indictment Based On Double Jeopardy.

Louisiana Code of Criminal Procedure, Article 591 provides that:

> "No person shall be twice put in jeopardy of life or liberty for the same offense, except, when on his own motion, a new trial has been granted or judgment has been arrested, or where there has been a mistrial *legally ordered* under the provisions of Article 775 or ordered with the express consent of the defendant." (Emphasis Added.)

Louisiana Code of Criminal Procedure, Article 592 further provides, in pertinent part, that:

> "When a defendant pleads not guilty, jeopardy begins when the first witness is sworn at the trial on the merits. . ."

In the case at hand, the mistrial was declared over defense objection, after the State's first witness, Deputy Ansardi, had been sworn and had testified at the trial on the merits. Obviously, therefore, jeopardy had attached.

The principles of double jeopardy do not apply, according to Louisiana Code of Criminal Procedure Article 591, when a mistrial has been "legally ordered." In order to be a "legally ordered" mistrial, however, it must be declared only in certain situations which are

specifically authorized by statute. As was stated in *State v. Clouatre*, 262 La. 651, 254 So. 2d 595 (1972):

> "Mistrial is a drastic remedy. It is only authorized in specific instances where unnecessary prejudice results to the accused." 262 So. 2d at 600-01.

It is respectfully submitted that the mistrial declared in the case at hand was not so authorized, and therefore it constituted an illegal dismissal of the proceedings.

The primary authority for the granting of a mistrial is found in Louisiana Code of Criminal procedure, Article 775, which lists the various grounds for a mistrial. (Louisiana Code of Criminal Procedure, Articles 770 and 771 are not applicable as this mistrial was granted *over* defense objection, and not upon request of the defendant.) Article 775 provides, in pertinent part, that:

> "A mistrial may be ordered, and in a jury case the jury dismissed, when:
>
> . . . .
>
> (3) There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law;
> . . ."

The trial court relied upon Article 775 of the Code of Criminal Procedure quoted above as its authority for granting the mistrial in this case, basing that authori-

ty upon what was held to be an erroneous interpretation of Article 487 of the Louisiana Code of Criminal Procedure, as it pertains to a defect in substance in an indictment. (See Appendix G.)

The trial court took the position that there existed a defect in substance in the original indictment for the reason that the body of the indictment properly charged the crime of manslaughter, whereas a typed caption on the reverse side of said indictment read "indictment for murder." The text of Article 487 which the Court held to be applicable in this case is as follows:

> "Art. 487. Defective Indictment; amendment A. An indictment that charges an offense in accordance with the provisions of this Title shall not be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because of any miswriting, misspelling, or improper English, or because of the use of any sign, symbol, figure, or abbreviation, or because any similar defect, imperfection, omission, or uncertainty exists therein. The court may at any time cause the indictment to be amended in respect to any such formal defect, imperfection, omission, or uncertainty.
>
> Before the trial begins the court may order an indictment amended with respect to a defect of substance. *After the trial begins a mistrial shall be ordered on the ground of a defect of substance.*" (Emphasis Added.)

It is submitted that the original indictment in the present case contained no defect of substance, as it was a valid indictment for manslaughter. The body of the indictment charges that the respondent John Ernest Birabent, "unlawfully killed Thomas Sciortino." This wording is in strict compliance with the requirements of Louisiana Code of Criminal Procedure, Article 465, which reads in pertinent part:

> "Article 465. Specific Indictment Forms
> The following forms of charging offense may be used. . . .
> Manslaughter — A.B. unlawfully killed C.D. . . ."

Neither Article 465 nor any other Article of the Louisiana Code of Criminal procedure establishes any requirement regarding the citation of the statute in question in the endorsement on the reverse side of the bill of indictment.

Louisiana Code of Criminal Procedure, Article 383, which specifically discusses the endorsement, states only that the indictment must be endorsed "a true bill", and that the endorsement must be signed by the foreman. A glance at the endorsement clearly establishes that both of these requirements have been complied with in the case at hand.

As is amply demonstrated by the authorities cited and quoted under *ARGUMENT A.*, it is the body of the indictment that should be considered and the citation of the murder statute and the word "Murder" on the reverse side are of no moment.

As is evidenced by the authorities cited and the arguments presented under *ARGUMENT B.*, hereinabove, the mistrial which was ordered by the trial court in the case at bar was not "legally ordered" within the meaning of Article 775 of the Louisiana Code of Criminal Procedure hereinabove quoted.

The State then takes the unusual position (for the State, that is,) that the respondent was not properly informed of the nature of the charged offense, although the respondent has never raised that issue at any time throughout these proceedings. The respondent, quite obviously, felt he was sufficiently informed, primarily by the precise short-form indictment for manslaughter, namely, that he "unlawfully killed Thomas Sciortino." Although the accused has a right to obtain further information by means of an application for a bill of particulars, he certainly has no obligation to do so. Perhaps the *State* was confused by the information furnished *by the State* in response to the respondent's application for a bill of particulars, but the respondent apparently was not. In connection with this argument, the State refers the Court to *State v. Cooper*, 249 La. 654, 190 So. 2d 86 (1966), which has no applicability to the case at hand. In Cooper, the *body* of the indictment (as opposed to the endorsement) charged that the accused on a certain date:

> "Did unlawfully kill Leroy Fontenot, in violation of L.R.S. 14:31, contrary to the form of the statute of the State of Louisiana, in such cases made and provided, in contempt of the authority of said State, and against the peace and dignity of the same." 190 So. 2d at p. ____.

L.R.S. 14:31 is the manslaughter statute. (See Appendix I.(2) the endorsement in *Cooper* read "manslaughter." The court did *not*, however, sustain the validity of the short-form indictment solely because the endorsement read manslaughter, as the State would have this Court believe, although the State court did refer to the endorsement in its opinion.

The State then proceeds to quote *part* of a footnote of the decision of the Louisiana Supreme Court in this matter. (See Pages 11-12 of the Application for Writs filed herein.) The State then asserts that "this portion of the opinion [of the Louisiana Supreme Court] is incredible . . ." However, if one reads the *entire* footnote, which is quoted below, one sees that it makes considerably more sense and is considerably less "incredible" than the State suggests:

> "2. Even if the face of the indictment and the back could be read together to charge murder (see State v. Cooper, 249 La. 654, 190 So. 2d 86 (1966), the indictment would still support a verdict. The defendant would have been in jeopardy for murder. Errors in court rulings are not attributable to the defendant. A court order of a mistrial under the indictment (if read as a murder indictment) without a motion by defendant constitutes double jeopardy."

Clearly, the portion of the footnote omitted by the State in its application for writs filed herein was rather significant.

Finally, in a last-ditch attempt to confuse the issue, the State asserts that a proper indictment for manslaughter would necessarily make some reference to commission of the crime in "sudden passion or heat of blood" or some other circumstance prescribed by L.R.S. 14:31. Such an assertion is blatantly incorrect, as should be obvious from the above discussion regarding the use of the short-form indictment in Louisiana, in which case it is sufficient for the indictment to charge, as did the indictment in this case, that AB "unlawfully killed "CD. Nothing further is required to be contained in the body of the indictment.

CONCLUSION

In light of the above discussion, it is respectfully submitted that the writs applied for herein should be denied because there existed no defect of substance in the original indictment in the case at hand. The mistrial, therefore, was not "legally ordered," and it constituted an illegal dismissal of the proceedings. Consequently, the principles of the doctrine of double jeopardy apply and the State of Louisiana should thus be barred from any further prosecution of the respondent for this offense, as was held by the Supreme Court of Louisiana.

Respectfully submitted:

F. IRVIN DYMOND
1228 F.N.B.C. Bldg.
New Orleans, Louisiana 70112
Telephone No. 524-3316

ANITA H. GANUCHEAU
1228 F.N.B.C. Bldg.
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WILLIAM L. CRULL, III
1228 F.N.B.C. Bldg.
New Orleans, Louisiana 70112
Telephone No. 524-3316

Attorneys for
John Ernest Birabent

CERTIFICATE OF SERVICE

I, F. Irvin Dymond, a member of the bar of the Supreme Court of the United States, hereby certify that three true copies of the foregoing Opposition to the Granting of the Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana were served on petitioner by mailing copies thereof in properly addressed envelopes to the following parties:

William J. Guste, Jr., Attorney General
State of Louisiana
234 Loyola Avenue
New Orleans, Louisiana 70112;

Ms. Barbara Rutledge,
Assistant Attorney General
State of Louisiana
234 Loyola Avenue
New Orleans, Louisiana 70112;

Leander H. Perez, Jr.,
District Attorney
Parish of St. Bernard
St. Bernard Courthouse
Chalmette, Louisiana;

Gilbert V. Andry, III,
Assistant District Attorney
Parish of Plaquemines
Plaquemines Parish Courthouse
Pointe-a-la-Hache, Louisiana;

Albert J. Reeves, Director,
Research and Appeals Division
Office of the District Attorney
Jefferson Parish, Suite 32
1820 Franklin Street
Gretna, Louisiana 70053.

F. IRVIN DYMOND

APPENDIX A

Twenty-Fifth Judicial District Court of Louisiana
Parish of St. Bernard

THE STATE OF LOUISIANA
Twenty-Fifth Judicial District S.S.

THE GRAND JURORS of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of St. Bernard, in the name and by the authority of the said State, upon their oath, PRESENT

That one John Ernest Birabent 2413 Charles Drive, Meraux, Louisiana late of the Parish of St. Bernard, on or about the 7th day of May in the year of Our Lord, one thousand, nine hundred seventy-two with force and arms in the said Parish aforesaid, and within the Jurisdiction of the Twenty-fifth District Court, for the Parish of St. Bernard, unlawfully killed Thomas Sciortino, Contrary to the form of the Statute of the State of Louisiana, in such cases made and provided, and against the dignity and peace of the same.

/s/ GILBERT ANDRY II
Assistant District Attorney,
Twenty-Fifth Judicial
District Court,
Parish of St. Bernard, La.

Filed _____

May 22 1922

_____

Sidney D. Dow Clerk

Arraigned _____

_____ 19____

Plea _____

_____

_____ Clerk

No. 24,951

Twenty-Fifth Judicial District Court

Parish of St. Bernard

The State of Louisiana

VS.

JOHN ERNEST BIRABENT

INDICTMENT FOR

MURDER

1950 L.R.S. 14:30

A TRUE BILL

Harry M. Fahey Foreman

St. Bernard Parish Grand Jury

22 May 1922

APPENDIX B

TRIAL COURT DECISION

EXCERPT OF THE MINUTES OF THE TWENTY FIFTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF ST. BERNARD, STATE OF LOUISIANA

Wednesday, October 3, 1973

Court met this day
Section "A"

Present: August A. Nobile, Jr., Judge
Lena Nunez, Deputy Clerk
Sal Nuccio, Deputy Sheriff
John Crawford, Court Reporter

NO. 24-994
State of Louisiana
Versus
John Ernest Birabent

This matter came before the Court for Trial.

Defendant present in proper person, accompanied by counsels, Mr. I. Dymond and Mr. William Crull, III.

Hon. Leander H. Perez, Jr. and Mrs. Charles H. Livaudais counsels for the State present.

All 12 Jurors present and accounted for, and was ordered to leave the Courtroom.

Mr. Dymond counsel for defense moved that the Indictment charging the defendant is a manslaughter Indictment and not a murder Indictment. Defense further moved that the Court restrict the evidence to be presented to that only pertaining to manslaughter.

The Court after hearing arguments sustains the objection of the defense.

State moves for a mis-trial, which counsel for defense objected. The Court after hearing arguments of counsel, finds there is a defect in substance of Indictment. Court cannot try defendant for murder.

Court grants motion for mis-trial, which counsel for defense objected. To which defense reserves a bill of exceptions making part thereof the arguments of counsel and ruling of the Court. State moves that defendant be remanded to the Parish Prison on charge of murder.

The Jury returned to the courtroom. Counsels for defense and State is satisfied that all jurors are present and accounted for.

Court informed the Jury that the State moved for a mis-trial, which the Court granted, and released the Jurors.

THERE BEING NO FURTHER BUSINESS, COURT ADJOURNED.

/s/ August A. Nobile, Jr.
JUDGE, SECTION "A"

Extract from the Minutes of this Court:
Clerk's Office April 4, 1975.

/s/ RANDELL E. McNEIL
Deputy Clerk

APPENDIX C

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

STATE OF LOUISIANA

versus No. 54,262

JOHN ERNEST BIRABENT

February 1, 1974

In re: John Ernest Birabent applying for writs of certiorari, prohibition, mandamus and for stay order.

Writ Denied:

We pretermit whether the trial court committed error, cf. State v. Lawrence, 221 La. 861,60 So. 2d 464 (1952), because relator has an adequate remedy in the trial court if error was committed.

/s/ AT Jr.
/s/ JWS
/s/ FWS
/s/ PFC
/s/ WFM

BARHAM, J., concurs. The issues presented here may be more pointedly made by motions in the trial court if prosecution continues. Adequate remedy is available in this Court if the trial court errs in future rulings.

DIXON, J., dissents. A grand jury indictment cannot be "amended" by the court from manslaughter to murder. Defendant has already been placed in jeopardy for this killing.

APPENDIX D

TWENTY-FIFTH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

NO.: 24-994

STATE OF LOUISIANA

versus

JOHN ERNEST BIRABENT

FILED: November 27, 1973
/s/ VONDELL G. McNEIL
Dep. Clerk of Court

MOTION

The Motion of the State of Louisiana, represented herein by Leander H. Perez, Jr., District Attorney and

Charles H. Livaudais, Assistant District Attorney, with respect represents:

I.

A mistrial was previously declared in this matter because of a substantive defect in the Indictment.

II.

The inscription by the Foreman of the Grand Jury which returned the Indictment indicates that the Grand Jury returned a True Bill for "Murder."

WHEREFORE, the State of Louisiana moves the Court to correct the Indictment so as to make all elements thereof conform to the charge of "Murder."

LEANDER H. PEREZ, JR.
DISTRICT ATTORNEY
For the State of Louisiana
/s/ CHARLES H. LIVAUDAIS
CHARLES H. LIVAUDAIS
ASSISTANT DISTRICT
ATTORNEY

ORDER

Considering the foregoing Motion, It Is Ordered that defendant, John Ernest Birabent, show cause on Tuesday the 11th day of December, 1973, why the Motion of the State of Louisiana should not be granted.

Chalmette, Louisiana, this 27th day of November, 1973.

/s/ AUGUST A. NOBILE, JR.
JUDGE

Please serve:
1) John Ernest Birabent

2) Mr. Irvin Dymond
Attorney for Defendant

1973

Dec. 11, Defendant present in proper person with counsels Mr. F. Irwin Dymond & Mr. William L. Crull, III. This came before the Court of Rule to Show Cause on Motion To Correct Indictment. After hearing testimony, evidence & Arguments presented by counsels & Bills of exceptions reserved by Mr. Dymond, the Court allowed the Indictment to be amended to read "Murdered" Thomas Sciortino. Court set this for Arraignment for Jan. 7, 1974.

Mr. Dymond objected to the ruling of the Court and Verbally notifies the Court that they will apply to the Supreme Court for Writs of Certiorari, Prohibition & Mandamus.

At this time in presence of the Court, & defense counsel, the Assistant District Attorney Mr. Charles H. Livaudais, amended the Indictment by striking out (Unlawfully killed) to replace with (Murdered) & Initial the same. Defense counsel formally objected to the amending of the Indictment, which the court allowed, Defense counsel reserves Bill of Exception to amending of Indictment & Ruling of the Court.

APPENDIX E

Twenty-Fifth Judicial District Court of Louisiana

THE STATE OF LOUISIANA
Twenty-Fifth Judicial District
S. S.

PARISH OF ST. BERNARD

THE GRAND JURORS of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of St. Bernard, in the name and by the authority of the said State, upon their oath, PRESENT

That one JOHN ERNEST BIRABENT
2413 Charles Drive,
Meraux, Louisiana

late of the Parish of St. Bernard, on or about the 7th day of MAY in the year of Our Lord, one thousand, nine hundred seventy-two with force and arms in the said Parish aforesaid, and within the Jurisdiction of the Twenty-fifth District Court, for the Parish of St. Bernard, ~~(wilfully killed)~~ murdered Thomas Scertino,

A TRUE COPY
SIDNEY D. TORRES
CLERK OF COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA
By Vaudell E. McKay
DEPUTY CLERK

Contrary to the form of the Statute of the State of Louisiana, in such cases made and provided, and against the dignity and peace of the same.

Assistant District Attorney, Twenty-Fifth Judicial District Court,
Parish of St. Bernard, La.

CHARLES H. LIVAUDAIS

No.

Twenty-Fifth
Judicial District Court
Parish of St. Bernard

The State of Louisiana
VS.

JOHN ENGLISH DEFENDANT

INDICTMENT FOR

MURDER

1930 J. B. S. 10:30

A TRUE BILL
Foreman of the Grand Jury

22 Nov 1930

10a

BLURRED C

APPENDIX F

25TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF ST. BERNARD

STATE OF LOUISIANA

versus

JOHN ERNEST BIRABENT

NO. 24-944, DIVISION "A"

MOTION TO QUASH

And now into this Honorable Court comes John Ernest Birabent, the defendant herein, through his attorneys, F. Irvin Dymond and William L. Crull, III, and prior to re-arraignment on the amended indictment but after the commencement of jeopardy on the original indictment and protesting that he is not-guilty of the offense set out in either the original or the amended indictment, moves to quash the amended indictment for the following reasons, to-wit:

I.

On May 22, 1972 the Grand Jury for the 25th Judicial District, Parish of St. Bernard, State of Louisiana, returned an indictment against your petitioner charging him with the crime of manslaughter in that he "* * * unlawfully killed Thomas Sciortino * * *."

OPY COPY FOUND VERTICALLY

II.

That your mover was arraigned on said indictment on May 29, 1972 and entered a plea of not-guilty to the offense charged therein.

III.

That the trial of your mover on said original bill of indictment was commenced on October 4, 1973; that a jury was selected, that said original indictment was read to the jury, that opening statements were made by the State and the defense, and the State called its first witness, Deputy Sheriff Wallace Ansardi, who was duly sworn and testified on direct examination against your mover.

IV.

That after the direct testimony of Deputy Sheriff Wallace Ansardi, counsel for the State moved to amend the indictment from a manslaughter indictment to a murder indictment, the Court denying said motion by counsel for the State.

V.

That after the ruling set forth in the preceding article, counsel for the State moved the Court for a mistrial on the ground that there was a defect of substance in the indictment, said defect being of such a nature as to render it impossible for a valid verdict to be returned thereon, which said motion was granted by the Court.

VI.

That said original indictment contained no defect in substance, being a valid indictment for the crime of manslaughter in accordance with Article 465 of the Louisiana Code of Criminal Procedure and being validly endorsed in accordance with Article 383 of the Code of Criminal Procedure.

VII.

That under the circumstances and in view of the fact that jeopardy had commenced and that defense counsel objected to the granting of a mistrial, the trial court was without authority to grant a mistrial which would have vitiated the jeopardy which had commenced.

VIII.

That on November 27, 1973, counsel for the State filed a motion "to correct the indictment so as to make all elements thereof to conform to the charge of murder."

IX.

That over defense objection the trial court ruled that the original indictment was defective in substance and granted permission to counsel for the State to amend same to read: "* * * murdered Thomas Sciortino."

X.

That the State now seeks to try your mover on the amended indictment charging him with the murder of Thomas Sciortino in spite of the fact that jeopardy had commenced in his trial on the original indictment charging him with the manslaughter of Thomas Sciortino when the Court unlawfully and unauthorizedly ordered a mistrial in those proceedings.

XI.

That the trial of your defendant on the amended indictment charging him with the murder of Thomas Sciortino would constitute double jeopardy.

XII.

That the indictment as amended is a complete nullity for the reason that the trial court had no authority to order the amendment of said indictment from one which charged manslaughter to one which charged the crime of murder. That under the circumstances the indictment as amended fails to charge an offense which is punishable under a valid statute.

XIII.

That under the provisions of Article 538 of the Code of Criminal Procedure, your mover is entitled to have the trial court order that he be discharged from custody.

XIV.

That the only circumstances under which a defendant may be re-tried on an indictment after a mistrial has been ordered are when same was legally ordered under the provisions of Article 775 of the Code of Criminal Procedure or with the express consent of the defendant. That the mistrial in these proceedings was not legally ordered under the provisions of Article 775 of the Code of Criminal Procedure and not only was same ordered without the express consent of the defendant, but over his vigorous objection.

XV.

That all of the proceedings herein mentioned took place in the 25th Judicial District Court for the Parish of St. Bernard, State of Louisiana in the instant proceedings.

XVI.

That the charge contained in the amended indictment is but a different grade of the same offense for which the defendant was in jeopardy on his trial on his original indictment which commenced as aforesaid on October 4, 1973.

XVII.

That the indictment as amended is based on the same offense, or alleged killing, for which offense your mover was in jeopardy in his trial on the original indictment which commenced on October 4, 1973.

XVIII.

That the entire proceedings in this matter, particularly, but not exclusively, the original bill of indictment, the amended bill of indictment, all pleadings filed by the State and defense, the transcript of all proceedings held herein especially during the trial that commenced October 4, 1973 and the entire record are incorporated herein by reference.

WHEREFORE, said John Ernest Birabent prays that this Motion to Quash be maintained and that the indictment in these proceedings be declared null and void and that he be discharged therefrom without date.

/s/ F. IRVIN DYMOND
F. IRVIN DYMOND
/s/ WILLIAM L. CRULL, III
WILLIAM L. CRULL, III
Attorneys for
John Ernest Birabent
1228 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112
Telephone No. 524-3316

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

F. IRVIN DYMOND,

who, after being duly sworn, did depose and say:

That he is one of the attorneys for the defendant in the above captioned matter and that all of the facts contained therein are true and correct to the best of his knowledge, information and belief.

/s/ F. IRVIN DYMOND
F. IRVIN DYMOND

SWORN TO AND SUBSCRIBED
before me, this 5th day of
February, 1974.

/s/ ROBERT J. OSTER
NOTARY PUBLIC

ORDER

Considering the foregoing motion:

IT IS ORDERED that the Honorable Leander H. Perez, Jr., District Attorney for the Parish of St. Bernard, State of Louisiana, show cause on the ____ day of _____, 1974, why the foregoing Motion to Quash should not be maintained and why the indictment in these proceedings should not be declared null and void and the defendant discharged therefrom without date.

Chalmette, Louisiana, this ____ day of February, 1974.

_____
JUDGE

APPENDIX G

SUPREME COURT OF LOUISIANA
No. 54,733

STATE OF LOUISIANA

versus

JOHN ERNEST BIRABENT

Monday, Dec. 2, 1974

On Writ of Review to the Twenty-Fifth Judicial District Court, Parish of St. Bernard, Honorable August A. Nobile, Judge.

BARHAM, Justice.

On May 22, 1972, the grand jury of St. Bernard Parish returned an indictment charging that relator "* * * unlawfully killed Thomas Sciortino* * *." This language contained in the indictment conforms exactly to the formula set forth in La. C.Cr.P. art. 465 for charging manslaughter in a short-form indictment. However, the typed endorsement of the name of the offense on the back of the indictment form read "MURDER" and there appeared the notation, "A True Bill" and the signature of the grand jury foreman in writing below.

On October 3, 1973, after the first witness who was sworn at the trial on the merits had testified, counsel for relator moved that the court restrict the reception of evidence to matters pertaining to the crime of

manslaughter. The basis for this motion was relator's position that the indictment charged only the crime of manslaughter, not the crime of murder. The trial court noted its agreement with the premise of relator's motion. Thereafter, the State requested that the court allow the amendment of the indictment to cure what it contended was a defect therein or, alternatively, that the court grant a mistrial. The court denied the State's request to amend the indictment to conform to a murder charge but granted the State's motion for a mistrial, giving as its reason therefor its opinion that the jury's prior knowledge of the murder charge against relator would prejudice him and deny him a fair trial on the manslaughter indictment. In addition, the court expressed its opinion that there existed in the indictment "* * *a defect that goes to the very substance of the charge." Relator objected to the granting of the mistrial and reserved a bill of exceptions when the trial court overruled the objection.

On November 27, 1973, the State filed a motion seeking correction of the indictment to make it conform to the charge of murder. A hearing on the motion was held on December 11, 1973, wherein the State presented, over defense objection, the testimony of the foreman of the grand jury which had returned the indictment. The foreman testified that the grand jury had voted to indict relator for murder. At the conclusion of the hearing, the trial court allowed the correction sought by the State and set a date for arraignment on the corrected indictment. Relator's counsel objected, reserved a bill of exceptions and gave the trial court notice of intention to apply to this Court for writs

of certiorari, prohibition and mandamus. The application to this Court was denied for the reason that relator had an adequate remedy in the trial court if error was committed. State v. Birabent, 288 So.2d 641 (La. 1974).

On February 6, 1974, relator filed a motion to quash the amended indictment, alleging that jeopardy had commenced on the original indictment on October 3, 1973, after the first witness was sworn at the trial on the merits begun at that time. Relator alleged that the trial court was without authority to grant the mistrial it had earlier declared on the basis of a defect of substance in the indictment because the indictment was a valid indictment for the crime of manslaughter. Therefore, relator contended that a prosecution based upon the corrected indictment would constitute double jeopardy. When the trial court denied relator's motion to quash, relator objected, reserved a bill of exceptions and applied to this Court for writs. We granted writs on April 30, 1974. State v. Birabent, 293 So.2d 192 (La. 1974).

La. C.Cr. P. art. 591 provides:

> "*No person shall be twice put in jeopardy of life or liberty for the same offense, except,* when on his own motion, a new trial has been granted or judgment has been arrested, or *where there has been a mistrial legally ordered under the provisions of Article 775* or ordered with the express consent of the defendant. (Emphasis here and elsewhere supplied).

Therefore, if the trial court legally ordered a mistrial under the provisions of La. C.Cr.P. art. 775, the principles of double jeopardy will not operate in relator's favor. La. C.Cr.P. art. 775 provides:

> "A mistrial may be ordered, and in a jury case the jury dismised, when:
>
> (1) The defendant consents thereto;
>
> (2) The jury is unable to agree upon a verdict;
>
> (3) *There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law;*
>
> (4) The court finds that the defendant does not have the mental capacity to proceed;
>
> (5) It is physically impossible to proceed with the trial in conformity with law; or
>
> (6) False statements of a juror on voir dire prevent a fair trial.
>
> Upon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771.
>
> A mistrial shall be ordered, and in a jury case the jury dismissed when the state and the defendant jointly move for a mistrial."

It is the State's contention that the mistrial granted by the trial judge was legally declared under Article 775(3) in that there existed "* * * a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law.* * *" The State contends that this "legal defect" existed by virtue of the fact that the court and counsel for the state and for relator treated the case as one for murder until the first witness had testified. The State argues that if the court had proceeded with the trial as one for manslaughter, any judgment entered upon a verdict would have been rendered reversible as a matter of law. Additionally the State contends that the indictment contained a defect of substance which warranted the declaration of a mistrial under La. C.Cr.P. art. 487.[1]

---

1 La. C.Cr.P. art. 487 provides:

"A. An indictment that charges an offense in accordance with the provisions of this Title shall not be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because of any miswriting, misspelling, or improper English, or because of the use of any sign, symbol, figure, or abbreviation, or because any similar defect, imperfection, omission, or uncertainty exists therein. The court may at any time cause the indictment to be amended in respect to any such formal defect, imperfection, omission, or uncertainty.

"Before the trial begins the court may order an indictment amended with respect to a defect of substance. After the trial begins a mistrial shall be ordered on the ground of a defect of substance.

"B. Nothing contained herein shall be construed to prohibit the defendant from entering a plea of guilty to a crime nonresponsive to the original indictment when such a plea is acceptable to the district attorney, and in such case, the district attorney shall not be required to file a new indictment to charge the crime to which the plea is offered."

We acknowledge that a substantial defect in the indictment would be grounds under La. C.Cr.P. art 775(3) for the declaration of a mistrial. Such a defect in the indictment would constitute "a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law." See Official Revision Comment (g) to La. C.Cr.P. art. 775. Therefore the central issue for our determination is whether the indictment which formed the basis for relator's prosecution contained a substantial defect.

There did not exist in this prosecution a legal defect which would render any judgment entered upon a verdict reversible as a matter of law. The indictment which formed the basis for the relator's prosecution was a perfectly valid indictment for the crime of manslaughter. The word "MURDER" and the alphabetical and numerical statutory designation "1950 L.R.S. 14:30" do not constitute any part of the finding of the grand jury; the endorsement is not a substantive part of the charge.[2] See State v. Lawrence, 221 La. 861, 60 So.2d 464 (1952); see also State v. DeHart, 109 La. 570, 33 So. 605 (1903). Nothing which took place during the proceedings would have vitiated a judgment entered upon a verdict rendered at the close of trial.

---

2 Even if the face of the indictment and the back could be read together to charge murder (see State v. Cooper, 249 La. 654, 190 So.2d 86 (1966)), the indictment would still support a verdict. The defendant would have been in jeopardy for murder. Errors in court rulings are not attributable to defendant. A court order of a mistrial under the indictment (if read as a murder indictment) without a motion by defendant constitutes double jeopardy.

Because there did not exist legally sufficient grounds under La. C.Cr.P. arts. 775 or 487 for the declaration of a mistrial, we hold that the trial court's action in granting a mistrial constituted an illegal dismissal of the prosecution against the relator and renders applicable our constitutional and statutory prohibitions against double jeopardy. La. Const. Art. I, §9 and La. Code of Criminal procedure art. 591.

For the reasons assigned, we hold that the trial court erred in denying relator's motion to quash. We therefore reverse that ruling and grant relator's motion.

* * * *

Sanders, C.J., dissents for the reasons assigned by Mr. Justice Summers.
Summers, J., dissents for the reasons assigned.
Marcus, J., dissents for reasons assigned by Justice Summers.

SUPREME COURT OF LOUISIANA

No. 54,733

STATE OF LOUISIANA

versus

JOHN ERNEST BIRABENT

SUMMERS, Justice (dissenting).

At the time of the commission of the offense involved here, the murder statute provided:

> "Murder is the killing of a human being,
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm; or
>
> (2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill.
>
> Whoever commits the crime of murder shall be punished by death." La. R.S. 14:30

The grand jury of St. Bernard Parish returned an indictment on May 22, 1972 against John Ernest Birabent. The indictment was read aloud in open court by the clerk of court in these words:

> "State of Louisiana versus John Ernest Birabent, Indictment for Murder, A True Bill, signed Harry M. Fisher, Foreman of the Grand Jury of St. Bernard Parish, 22nd day of May, 1972."

The portion of the indictment read aloud in court appeared on the endorsement. The pertinent charging portion of the indictment appearing on the face of the document read:

> "That one JOHN ERNEST BIRABENT (address) late of the Parish of St. Bernard, on or about the 7th day of May in the Year of Our Lord, one thousand, nine hundred seventy-two with force of arms in the said Parish aforesaid, and within the jurisdiction of the Twenty-fifth District Court, for the Parish of St. Bernard, *unlawfully killed Thomas Sciortino* . . . ." (emphasis added.)

Thereafter, while represented by retained counsel, Birabent was arraigned on May 29, 1972 on the charge read to him by the clerk in these words: "John Ernest Birabent, on or about the seventh day of May, 1972, unlawfully killed one Thomas Sciortino. How do you plead?" Whereupon he entered a plea of not guilty and asked for fifteen days in which to file special pleadings. Defendant later received service of a copy of the indictment.

Then on June 12, 1972 defendant Birabent filed a motion for a preliminary hearing, a motion to divulge evidence, an application for a bill of particulars and a

prayer for oyer. The motion for a preliminary hearing alleged that he was incarcerated in the St. Bernard parish jail by virtue of "an indictment for murder" returned by the grand jury.

Some six months later, defendant filed an application for particulars making specific reference to the murder statute and requesting information as to which paragraph or subsection he was charged with having violated. If it was the second subsection of that statute, he requested information concerning the particular felony the State contended he was engaged in perpetrating at the time of the alleged offense. The State answered that he was being charged under "14:30 (1)", the statute defining murder and prescribing its penalty.

On February 7, 1973 defendant filed a motion for disclosure of alleged similar offenses wherein he conceded that he was charged "with the crime of murder as defined by R.S. 14:30 and that the District Attorney in answer to an Application for Particulars has specified that the indictment herein is based upon Subsection (1) of said R.S. 14:30." He further alleged, "That Subsection (1) of R.S. 14:30 requires specific intent to kill or to inflict great bodily harm as one of the ingredients of the crime which it prohibits."

In addition to the foregoing, a number of motions for continuance and other matters were filed by defendant prior to trial, some of which were tried and disposed of by the trial judge. Minute entries in the case referred to the cause as an "Indictment for Murder."

Examination of jurors on voir dire on October 2, 1973 was conducted with the understanding that the trial was to be on a charge of murder. According to Article 791 of the Code of Criminal Procedure, as in capital cases, after each juror was sworn he was sequestered. If the trial were being conducted as a manslaughter prosecution, this would not have been necessary.

At the time, the decision in Furman v. Georgia 408 U.S. 238 (1972), declaring capital punishment unconstitutional had not become final. In keeping with the law then applicable to a prosecution for murder, the judge instructed the jurors that if they, in a capital case, had conscientious scruples against the infliction of capital punishment it was a cause for challenge. Such a charge would not have been relevant to a manslaughter prosecution, for that crime does not involve capital punishment.

When the trial began the entire indictment was read aloud in open court, and, in compliance with instructions from the trial judge, the clerk recited the date of defendant's plea as follows: "John Ernest Birabent, was indicted for murder on May 29th, 1972 and the Defendant was arraigned and plead not guilty . . ."

In his opening statement the State's attorney stated that defendant was "charged with the murder of one Thomas Sciortino," and "The Parish of St. Bernard has indicted him for the crime of murder." The law defining the crime of murder was explained in detail by specific reference to the articles of the criminal code on the subject. He further stated, "It is the contention

of the State that the Defendant is guilty of murder and that essentially he intended to kill or inflict great bodily harm upon the deceased." He then gave a statement of the facts upon which the State would rely to prove its case. All of the foregoing was without objection by the defense.

In his opening statement defense counsel said:

> "Let me say at the outset that there is going to be no argument whatsoever about whether or not John Birabent shot and killed Thomas Sciortino. He did shoot him. He did kill him. The whole issue in this case is going to be the question of whether he was justified in doing this . . . ."

When defense counsel concluded his opening statement, the first State witness was called and questioned at length, and photographs were introduced in evidence without objection.

At this time defense counsel pointed out to the Court that the bill of indictment charged the crime of manslaughter and not the crime of murder. He argued that the precise language of Article 465 of the Code of Criminal Procedure setting forth the short form of indictment for manslaughter had been employed in the indictment. Accordingly, he moved that the court restrict the evidence in the case thereafter to evidence appropriate to a charge of manslaughter rather than murder.

In answer the State argued that if a defect existed in the indictment, the judge could permit its amendment to cure the defect, or, alternatively, that a mistrial should be granted. The amendment of the indictment was denied, but the judge did grant a mistrial. He was of the opinion that the indictment for manslaughter could not serve as a basis for the continuation of the trial because the jury had been informed that the trial was for murder. To continue the proceedings would require that the jury be informed that the trial would thereafter be converted to a manslaughter trial. He was further of the opinion that the charging portion of the indictment followed the short form indictment for manslaughter, whereas the indorsement of the indictment plainly showed that a true bill had been returned for murder. This, he believed, was a defect going to the very substance of the charge. Defendant objected to the ruling and reserved a bill of exceptions.

A motion to amend the indictment was filed by the State on November 27, 1973 to correct it to make all elements thereof conform to the charge of murder. This was to be accomplished by deleting the words "unlawfully killed" and substituting the word "murdered" in the charging portion of the body of the indictment. The indorsement was to remain unchanged. At the hearing on this motion to amend, the foreman of the grand jury was allowed to testify for the State, over defense objection, that the jury did in fact indict the defendant for murder. His testimony was to the effect that the indorsement for murder represented a true record of the grand jury's findings. The amendment was allowed, and the defendant was cited to be rearraigned at a future date.

In the reasons given for his ruling at this time, the trial judge again restated the grounds for granting the mistrial. In part, these reasons were: "The Court granted a mistrial, but more importantly for another reason. It realized that it could not try this man for murder based on the front of the form (indictment) which listed the charge of manslaughter, yet the jury had been told this defendant was being tried for murder."

Again defense counsel objected, reserved a bill of exceptions and notified the trial judge of his intention to apply to this Court for writs of certiorari, prohibition and mandamus. The application to this Court was denied on February 1, 1974 with this statement of reasons: "We pretermit whether the trial court committed error, cf. State v. Lawrence, 221 La. 861, 60 So. 2d 464 (1952), because relator has an adequate remedy in the trial court if error was committed."

When the proceedings were resumed in the trial court, counsel for the defense filed a motion to quash the amended indictment prior to rearraignment, alleging that jeopardy had commenced on the original indictment after the first witness was sworn and testified. He alleged, moreover, that the trial judge was without authority to grant a mistrial on the basis of a defect in the substance of the indictment, the indictment being a proper and legal charge for manslaughter. It followed, therefore, according to the motion, that the attempt to arraign defendant and try him on the amended indictment would constitute double jeopardy. Amendment of the indictment was also cited as a ground for the motion to quash. The motion to

quash was denied, after which the defense objected to the ruling and reserved a bill. Application to this Court to review the ruling was granted.

The validity of the plea of double jeopardy depends upon the correctness of the trial judge's ruling granting a mistrial. That ruling was based on two grounds: First, that the indictment contained a defect of substance, and, secondly, and most importantly, the principal reason was that the State's attorney, defense counsel and the trial judge proceeded in this matter upon the basis that the defendant was charged with murder. The jury had been informed to that effect, and to alter the basis of the trial, once commenced, as requested by defense counsel, from a trial on a charge of murder to a trial on a charge of manslaughter would so confuse and confound the jury that a fair trial could not be had.

The first ground upon which the mistrial was granted was that a defect of substance in the indictment required the granting of a mistrial.

Article 776 of the Code of Criminal Procedure provides:

> "A mistrial may be ordered, and in a jury case, the jury dismissed, when:
>
> (1) The defendant consents thereto;
>
> (2) The jury is unable to agree upon a verdict;

(3) There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law;

(4) The court finds that the defendant does not have the mental capacity to proceed;

(5) It is physically impossible to proceed with the trial in conformity with law; or

(6) False statements of a juror on voir dire prevent a fair trial.

"Upon motion of a defendant a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for defendant to obtain a fair trial, or when authorized by Article 770 or 771.

"A mistrial shall be ordered, and in a jury case the jury dismissed, when the state and the defendant jointly move for a mistrial."

The defense contention, as noted, is that the indictment properly charged manslaughter and the indorsement referring to murder formed no part thereof. On this argument, it is said, the indictment was good and sufficient, and there was no defect in the proceedings which would make any judgment entered upon a ver-

dict reversible as a matter of law. Therefore, the requirements of Article 775 (3) have not been met which would permit a mistrial where a legal defect in the proceedings exists making any judgment entered upon a verdict reversible as a matter of law. Nor have the requirements of Article 487[1] been met which stipulate that after the trial begins a mistrial shall be ordered on the ground of a defect of substance in the indictment.

The State answers this contention as follows: An indictment is a written accusation of crime by a grand jury. "It must be concurred in by not less than nine of the grand jurors, indorsed 'a true bill', and the indorsement must be signed by the foreman." La. Code Crim. Proc. art. 383. Clearly, by this authority, the indorsement is an essential part of any indictment. It is reasonable to conclude, therefore, that to ascertain the true meaning of an indictment, the whole of the document, including the indorsement, must be considered. It is upon this rationale that the Court decided State v. Cooper, 249 La. 654, 190 So. 2d 86 (1966), and permitted reference to the indorsement to clarify the meaning of the indictment. There the Court said that a fair reading of the whole document, including the indorsement, properly informed the accused of the crime he was

1 La. Code Crim. Proc. art. 487 provides:

"An indictment that charges an offense in accordance with the provisions of this Title shall not be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because of any miswriting, misspelling, or improper English, or because of the use of any sign, symbol, figure, or abbreviation, or because any similar defect, imperfection, omission, or uncertainty exists therein. The court may at any time cause the indictment to be amended in respect to any such formal defect, imperfection, omission, or uncertainty."

charged with violating. In the Court's opinion, ". . . the indorsement of the foreman of the grand jury setting out the 'charge' for which a true bill was found is as much a part of the indictment as the remainder of the document." See also State v. Stoma, 199 La. 529, 6 So. 2d 650 (1942), and State v. Morrison, 30 La. Ann. 817 (1878).

Reading the indictment as a whole in the instant case readily reveals an irreconcilable conflict between the body of the indictment charging manslaughter in the short form (La. Code Crim. Proc. art. 465) and the indorsement showing the grand jury return to be: "Indictment for Murder 1950 L.R.S. 14:30". This irreconcilable conflict led the trial judge to the conclusion that the indictment contained a defect of substance.

The argument of the State on this issue appears to be in keeping with the spirit of the Code requiring that just determination of criminal cases be paramount to technicalities of procedure. The argument seems, further, to be in accord with a recognition of the fact that the blemish and inconvenience in the law brought about by strict construction of indictments enabled more offenders to escape by the over easy ear given to exceptions in indictments, than by their own innocence. Hale, *History of Pleas to the Crown* (1st Am. Ed. 1847). Indictments are not to be employed as vehicles for a battle of wits between the draftsman and a defense counsel who seeks to checkmate the State by reason of some inadvertent and often highly technical omission. Comments, La. Code Crim. Proc. art. 465.

But we need not rest our decision on this first ground relied upon by the trial judge to grant a mistrial. The second ground he adopted is a sound basis for that ruling. Thus, when all concerned (the judge, jury, district attorney and defense counsel) conducted the proceedings in the belief that they were involved in a murder trial; and, because of a misleading indictment, defense counsel moved after commencement of trial to convert the proceeding into a manslaughter trial, that in itself, independent of the controversy over the indictment, would so impregnate the proceedings with defects that any judgment entered upon a verdict would be reversible as a matter of law. In effect, the conduct of all those involved in the trial, the judge, the district attorney and defense counsel, in leading the jury to believe the trial was on a charge for murder when the indictment charged manslaughter, though in good faith and well-meaning, so confused the issues as to make a fair trial impossible for defendant. (La. Code Crim. Proc. Art. 775 [3]). It was, after all, at the instance of defense counsel that a motion was made to have all evidence restricted to a charge of manslaughter. The trial judge in his wisdom decided this could not be done without confusing and confounding the jury to the extent that defendant would be deprived of a fair trial.

It is apparent that our judgment today is not in keeping with the principle heretofore adopted in this Court's decisions that the law should be interpreted in such a way that reasonable and necessary mistrials will not form the basis for the application of the doctrine of double jeopardy. State v. Roberson, 255 La. 74, 72 So. 2d 265 (1954); State v. Varnado, 124 La. 711, 50 So. 661 (1909).

Louisiana's constitution guarantees that no person shall be twice put in jeopardy of life or liberty for the same offense except on his own application for a new trial or where there is a mistrial, or a motion in arrest of judgment is sustained. La. Const. Art. I, ¶ 9. The guarantee is restated in Article 591 of the Code of Criminal Procedure.[2] But jeopardy does not attach under the constitution or under Article 591 of the Code of Criminal Procedure when, in the first proceeding, as here, the indictment is not clearly stated, and, in addition, all concerned, the judge, district attorney, defense counsel and the jury, were in error as to the charge upon which the prosecution was based. To make the change from murder to manslaughter suggested by defense counsel would confound and confuse the jury and deprive defendant of a fair trial. State v. Dozier, 258 La. 323, 246 So.2d 187 (1971).

In my opinion, the trial judge correctly ordered a mistrial.

I respectfully dissent.

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2 La. Code Crim. Proc. art. 591 provides:

"No person shall be twice put in jeopardy of life or liberty for the same offense, except, when on his own motion, a new trial has been granted or judgment has been arrested, or where there has been a mistrial legally ordered under the provisions of Article 775 or ordered with the express consent of the defendant."

APPENDIX H

UNITED STATES OF AMERICA
STATE OF LOUISIANA
SUPREME COURT OF THE STATE OF LOUISIANA

New Orleans, 70112

New Orleans, Friday, January 17, 1974

Court was duly opened pursuant to adjournment. Present Their Honors: Joe W. Sanders, Chief Justice, Frank W. Summers, Mack E. Barham, Albert Tate, Jr., John A. Dixon, Jr., Pascal F. Calogero, Jr., Walter F. Marcus, Jr., Associate Justices.

REHEARING REFUSED

54,733 State v. Birabent

SANDERS, C.J., SUMMERS and MARCUS, J.J., are of the opinion that a rehearing should be granted.

I, Harold A. Moise, Jr., Clerk, Supreme Court of Louisiana, do hereby certify the above to be a true and correct extract from the minutes of this Court.

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the Court aforesaid, at the City of New Orleans, this the 24th day of January, A.D., 1975.

/s/ HAROLD A. MOISE, JR.
Clerk, Supreme Court
of Louisiana

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS

(1) Louisiana Code of Criminal Procedure, in pertinent part, the following Articles:

(a) Article 383. Indictment

An indictment is a written accusation of crime made by a grand jury. It must be concurred in by not less than nine of the grand jurors, indorsed "a true bill," and the indorsement must be signed by the foreman. Indictments shall be returned into the district court in open court; but when an indictment has been returned for an offense which is within the trial jurisdiction of another court in the parish, the indictment may be transferred to that court.

(b) Article 462. Form of grand jury indictment

The indictment by a grand jury may be in substantially the following form:

In the (here state the name of the court.) on the ____ day of _____, 19____. State of Louisiana v. A.B. (here state the name or description of the accused.).

The grand jury of the Parish of _____, charges that A.B. (here state the name or description of the accused.) committed the offense of _____, in that (here set forth the offense and transaction according to the rules stated in this Title. The particulars of the offense may be added with a view to avoiding the necessity for a bill of particulars.) contrary to the law of the State of Louisiana and against the peace and dignity of the same.

(c) "Article 465. Specific Indictment Forms

The following forms of charging offenses may be used. . . . Manslaughter — A.B. unlawfully killed C.D. . . ."

(d) Art. 487. Defective Indictment; amendment A. An indictment that charges an offense in accordance with the provisions of this Title shall not be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because of any miswriting, misspelling, or improper English, or because of the use of any sign, symbol, figure, or abbreviation, or because any similar defect, imperfection, omission, or uncertainty exists therein. The court may at any time cause the indictment to be amended in respect to any such formal defect, imperfection, omission, or uncertainty.

Before the trial begins the court may order an indictment amended with respect to a defect of substance. After the trial begins a mistrial shall be ordered on the ground of a defect of substance.

(e) Article 591.

No person shall be twice put in jeopardy of life or liberty for the same offense, except, when on his own motion, a new trial has been granted or judgment has been arrested, or where there has been a mistrial legally ordered under the provisions of Article 775 or ordered with the express consent of the defendant.

(f) Article 592.

"When a defendant pleads not guilty, jeopardy begins when the first witness is sworn at the trial on the merits . . ."

(g) Article 775.

"A mistrial may be ordered and in a jury case the jury dismissed, when:

* * *

(3) There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; * * *"

Section 31. Mansalughter

Manslaughter is:

(1) A homicide which would be murder under subdivision (1) of Article 30 (Murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Article 30, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting unlawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under subdivision (1) of Article 30.

Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years.